

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA**

HUNTINGTON DIVISION

**WEST VIRGINIA HIGHLANDS CONSERVANCY,
APPALACHIAN VOICES and
SIERRA CLUB**

Plaintiffs,

v.

Civil Action No. 3:19-0573

LEXINGTON COAL COMPANY, LLC,

Defendant.

**DEFENDANT LEXINGTON COAL COMPANY, INC.'s RESPONSE TO SPECIAL
MASTER'S REPORT AND TIMELINE**

COMES NOW Lexington Coal Company, LLC, by and through counsel provides the following *Defendant Lexington Coal Company, Inc.'s Response to Special Master's Report and Timeline* as follows:

The Special Master James Kyles sent out an Opinion and Recommendation dated April 10th, 2023, ("Special Master Report"), and a Timeline for Recommendations dated April 21, 2023 ("Special Master Timeline"). This Court Directed "Plaintiffs and Defendant to respond to the Report and the timeline by May 1, 2023." See Court's Order, ECF No. 115. The Special Master provided that "[t]here is reasonable likelihood that the East BCR for selenium mitigation associated with Outlet 31, will prove successful in meeting the discharge criteria for selenium; however, additional work should be performed to ensure the BCR sizing is adequate for actual operating conditions." Special Master Report at 2. "Based on the information received, it is the opinion of the Special Master that the "Defendant's Remediation Plan for selenium . . . may achieve compliance with selenium discharge by September 6, 2023." Special Master Report at 1.

The Special Master concluded that “[b]ased on the observations noted in Section 1.0, a series of recommendations was made by the Special Master to which facilitate the Defendant’s ability to achieve compliance with Court and permit requirements.” Special Master Timeline at 2. “[T]he recommendations, predicated on standard, accepted science and engineering principles, will increase the probability of achieving compliance for both ionic pollutants and selenium discharges.” *Id.* The Special Master suggested that “ongoing oversight from the Court or a Special Master be provided in concert with the specific recommendations” contained in the Special Master Report. Special Master Report at 3.0. The Defendant Lexington agrees with Special Master Kyles recommendations contained in the Special Master Report and Timeline. Furthermore, as outlined in the Special Master Kyles next steps, Lexington would like to have a teleconference or videoconference with the Special Master to review the Option, Recommendations, and Schedule contained in the Report.

Also, Lexington has implemented sampling to address the Special Master Kyles comments regarding the lack of studies on instream data to evaluate the stream health around the outlets. Additionally, to address the Special Master Kyles comments that the Defendant will only build the North and South BCR if required, Lexington will add an additional bioreactor to the already existing East BCR to help further address selenium on White Flame. For the White Flame BCR’s, Lexington will build the second BCR to a sufficient size that will be equal to or greater than the volume suggested by the Cardno design proposal for treatment of selenium. Lexington will continue to gather data on a weekly basis to fulfill the Special Master Kyles request for additional testing data.

Outlet 002, 017, and 024 at Low Gap are under fish tissue monitoring and are currently in compliance with NPDES permit for fish tissue standards approved by the West Virginia

Department of Environmental Protection (WVDEP). Outlet 019 failed to meet fish tissue standards. White Flame Outlets 004/005 and 012 are in compliance with the approved NPDES permit for fish tissue standards. Modifications have been submitted to the WVDEP to change Outlets 031, 045 and 047 which failed the fish tissue standards to have calculated numeric limits at the respective Outlets.

In conclusion, Defendant Lexington agrees with the Special Master Kyles recommendation contained in Special Master Kyles Report and Timeline. Furthermore, as outlined in the Special Master Kyles next steps, Lexington would like to have a teleconference or videoconference with the Special Master to review the Option, Recommendations, and Schedule.

/s/ W. Howard Sammons

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

**OHIO VALLEY ENVIRONMENTAL
COALITION, WEST VIRGINIA
HIGHLANDS CONSERVANCY,
APPALACHIAN VOICES,
and SIERRA CLUB,
Plaintiffs,**

CIVIL ACTION NO. 3:10-00573

v.

**LEXINGTON COAL COMPANY, LLC,

Defendant**

CERTIFICATE OF SERVICE

I hereby certify that on the May 1st, 2023, the foregoing *Defendant's Response to Special Master's Report and Timeline* was electronically filed via the CM/ECF system, which will send notification of such filing to all parties receiving ECF Notices in this matter.

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Respectfully Submitted,
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